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Supreme Court, U.S.
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No.98-1010
In The
Supreme Court of the United States
October Term, 1998

UNITED STATES OF AMERICA
EX.REL.DILIP K. PAUL,

Petitioners,

v.

U. So. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION

and PARSONS, BRINKERHOFF, QUADE & DOUGLAS, INC., PB-KBB, INC, BATTELLE MEMORIAL INSTITUTE, ANSON PHIPPS, PAUL BOULON and ROBERT M. WOOD,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THIS COURT HAS SUBJECT MATTER JURISDICTION OVER THE CASE?

2. DID ROBERT WOOD CONSENTED AT THE TIME OF REMOVAL?

3. DID THE REMOVAL COMPLY WITH THE REMOVAL STATUTE?

4. DID THE PETITIONER WAIVED HIS RIGHTS TO OBJECT TO THE DEFECTS IN THE REMOVAL?

5. DID THE COURTS BELOW APPLY CORRECT LAWS IN THIS CASE?

6. IS THE INSTANT ACTION DISTINGUISHABLE FROM HIS RULE 60(b) MOTION?.

7. FALSE, MISLEADING AND MISSTATEMENTS IN BMI'S REPLY BRIEF. Shall the Court reject BMI's reply brief?

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Table of Contents	i
Table of Authorities	ii-iii

1. WHETHER THIS COURT HAS SUBJECT M ATTER JURISDICTION OVER THE CASE? 2

2. DID ROBERT WOOD CONSENTED AT THE TIME OF REMOVAL? 3

3. DID THE REMOVAL COMPLY WITH THE REMOVAL STATUTE? 3

4. DID THE PETITIONER WAIVED HIS RIGHTS TO OBJECT TO THE DEFECTS IN THE REMOVAL? 4

5. DID THE COURTS BELOW APPLY CORRECT LAWS IN THIS CASE? 5

6. IS THE INSTANT ACTION DISTINGUISHABLE FROM HIS RULE 60(b) MOTION?. 6

7. FALSE, MISLEADING AND MISSTATEMENTS IN BMI'S REPLY BRIEF. Shall the Court reject BMI's reply brief? 8

CONCLUSION 9

TABLE OF AUTHORITIES

Cases

American Fire and Casualty Co. v. Finn, 341 U. S 6, 14; 71 S. Ct. 534, 540; 95 L. Ed. 702, 709. (1951). 3

Erie R. Co. V. Tompkins, 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 1188 (1938), 5

Gordon v. Manzella (1967, WD Mo) 270 F. Supp 40.. 4

Sabine Pilot Services, Inc. v. Hauck, 687 So. W. 2d. 733 (Texas 1985), 5

United States v. Throckmorton, (1878), 98 US 61, 25 L. ed 93," 7

Willis V. Mavrik, 760 S.W.2d 642, 644-45 (Tex. 1988), 5

STATUTES & REGULATIONS

False Claims Act 2, 3

U. S. C. § 3730 (e)(4) (1994) 2

Legislative history of the False Claims Amendment Act of 1986, P. L. 99-562, [Senate Report (Judiciary Committee) No. 99-345. July 28, 1986 {To accompany S. 1562}]. **Cong. Record Vol 132 (1986). p-5274,** 2

RICO, (18 U. S. C. § 1961 et seq 3, 9

(28 U. S. C. § 1446 et. seq., 3

28 U. S. C. A. § 1441 (c) 3

28 U. S. C. A. §1447(c) 4

Texas State Codes §§ 16.064 and 16.065 [Title 2, Chapter 16, Trial Matters Limitations] 5

Rule 60(b) 8

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PETITIONER'S REPLY BRIEF

Respondent Battelle Memorial Institute's arguments highlight why this Court should grant the petition. Respondent Robert Wood, PB-KBB, Parsons, Brinckerhoff, Quade & Douglas, Inc. (PBQ&D), Anson Phipps and Paul Boulon did not submit their brief in opposition conceding that Petitioner did not make any misstatement in his petition. Battelle was not a party in the original case (No. 87-30221) in the Harris County Court based on which Battelle is claiming *res judicata*. Battelle was not a party in that suit, but PB-KBB, Robert Wood, Anson Phipps and Paul Boulon were.

These defendants knew what went on in that suit and they are not claiming *res judicata* in this Court. This is very significant in this case. Petitioner put his response as under:

1. JURISDICTION

Battelle claims that the Government knew the facts on which petitioner bought his *qui tam* action and that is why under 31 U. S. C. § 3730 (e)(4) (1994), petitioner is not the original source, and he cannot maintain this action and this Court does not have subject matter jurisdiction. This assertion is false, fraudulent and misleading. Government has knowledge that the geological formation in which the subject facilities were to be built contains explosive gases. PBQ&D/ PB-KBB 's reports submitted in 1984 also contain the same information. This action is not bought because there is gas in the strata, which is in there for many millions of years. **Petitioner's FALSE CLAIMS ACT claims are based on the fact that Battelle, PBQ&D/PB-KBB failed to determine how much gas is in the geological strata and for their failure to design complying with their own written contractual specifications.**

Further, PB-KBB admitted in the open Court in the Federal Mine Safety & Health Review Commission's (FMS&HRC) proceeding that they obtained the contract by *falsifying their qualifications as mining engineering experts.* Under the legislative history of the False Claims Amendment Act of 1986, P. L. 99-562, [Senate Report (Judiciary Committee) No. 99-345. July 28, 1986 {To accompany S. 1562}]. **Cong. Record Vol 132 (1986). p-5274,** any claim submitted to the Government under this contract is a false claim: *"Likewise, each and every claim submitted under a contract, loan guarantee, or other agreement which was originally **obtained by means of false statements** or other corrupt or fraudulent conduct, or in*

violation of any statute or applicable regulation, ***constitute a false claim."*** (emphasis added).

The Government had no knowledge of any of these. Petitioner is the ***sole and original*** source of information based on which the instant action is brought, and thus this court has jurisdiction over this case. Battelle had asserted this defense in H-92-2429, but U. S. District Judge, David Hittner, after examination of the evidence, rejected this defense earlier.

2. DID ROBERT WOOD CONSENTED AT THE TIME OF REMOVAL.

Robert Wood did not consent at the time of removal. He submitted defense in the Harris County District Court, thereby waived and lost his rights to the removal. Battelle stated at that time that Robert Wood's **consent is not necessary** as he is not a defendant under the False Claims Act and under RICO, (18 U. S. C. § 1961 et seq). But after learning that Robert Wood is a defendant under those statutes, **Battelle changed its defense.** Now, Battelle is claiming that since Robert Wood submitted a Jury demand on 4/4/97 to the U. S. Court, his that action constituted consenting to the removal **retroactively** from 3/27/97. A very strange construction of the removal statute which was rejected by every Courts in the nation.

3. DID THE REMOVAL COMPLY WITH THE REMOVAL STATUTE?

Removal did not comply with the removal statutes, (28 U. S. C. § 1446 et. seq., 28 U. S. C. A. § 1441 (c) as the claims are not separate and independent, American Fire and Casualty Co. v. Finn, 341 U. S. 6, 14; 71 S. Ct. 534, 540; 95 L. Ed. 702, 709. (1951). In this case, this Court hold that no rights of removal exists where recovery of damages is sought for

single injury that is proximate result of successive acts of tortious conducts. Also see Gordon v. Manzella (1967, WD Mo) 270 F. Supp 40.. At 341 U. S. 14, this Court hold that where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441 (c). This is exactly the case here and is not removable as asserted by Battelle on 3/27/97, while removing the case.

There are other arguments put forwards **later on** claiming that the case is removable on other grounds as well, but the **statutory time was over to assert those grounds, and could not be retroactively applied.** Whatever grounds for removal was not asserted by the removing defendants on 3/27/97, are **statutorily waived** and **Federal Courts** cannot make **retroactive application on its own** which the defendants failed to do. Since the removing defendants failed to assert those grounds within the specified time period **they waived those rights** and the Federal Courts **cannot** hold the case, as happened in this case.

4. DID THE PETITIONER WAIVED HIS RIGHTS TO OBJECT TO THE DEFECTS IN THE REMOVAL?

The Fifth Circuit stated (App. 1 at A-43) that petitioner waived his rights by his untimely motion for remand. This construction is erroneous and failed to consider all the requirements of the removal statute. Petitioner filed his objections **timely.** The removal statute, 28 U. S. C. A. §1447(c) requires petitioner to submit his objection **within 30 days of the removal notice. Battelle failed to notify petitioner "promptly" and petitioner cannot be penalized for Battelle's fault. A statute cannot penalized innocent party for the non-compliance of his opponent(s).**

5. DID THE COURTS BELOW APPLY CORRECT LAWS IN THIS CASE?

The Courts below failed to apply state laws in the instant case. Under Erie R. Co. V. Tompkins, 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 1188 (1938), state laws are to be applied in the instant case.

Robert Wood brought Action No. 87-30221 under the state case law, here the frauds on the Court, abuse of the Court's process, violation of RICO, breach of fiduciary duties and other tortious conducts occurred. The courts below applied *res judicata* based on judgement of that case, even though the judgment is **void** because of Lydia Clay-Jackson's unauthorized appearance on behalf of petitioner in the case. Further *res judicata* could not be used based on that judgment because of extrinsic fraud was perpetrated on the court in order to secure that judgment.

The instant case was brought in the Harris County District Court under Texas State Codes §§ 16.064 and 16.065 [Title 2, Chapter 16, Trial Matters Limitations] for setting aside the judgment obtained under 87-30221, by perpetrating extrinsic frauds on the Court. That is why, *res judicata* must be applied by complying with the state laws.

The Texas Supreme Court specifically laid the ground rules on which to file suits when fiduciary duties are broken. Under Willis V. Mavrik, 760 S.W.2d 642, 644-45 (Tex. 1988), when fiduciary duty is broken, **plaintiff's cause of action accrues only after when she discovered all the elements of her cause action.**

The State Supreme Court stated, "The policy reasons relied upon by Texas courts in adopting the discovery rule in actions for fraud, credit libel, and medical malpractice are no less compelling in legal malpractice actions. An attorney is

obligated to use skills, prudence, and diligence commonly exercised by practitioners of his profession. The California Supreme Court has recognized that a "[c]orollary to this expertise is the inability of the layman to detect its misapplication; the client may not recognize the negligence of the profession when he sees it." [citations] A Texas commentator states: "[i]t is unrealistic to expect a lay man client to have sufficient legal acumen to perceive an injury at the time of the negligent act or omission of his attorney." [citation]. 760 S. W. 2d. at 645.

Further at 760 S. W. 2d. 646, the Court stated: "In sum, we believe that any burden placed upon an attorney by application of the discovery rule is less onerous than the injustice of denying relief to unknowing victims. *See* Not, *Accrual of Statute of Limitations*, 68 Calif. L. Rev. 106, 119 (1980); Note, *Limitation of Action,* 46 Texas L. Rev. 119, 120-21 (1967). Accordingly, we hold that the statute of limitations for legal malpractice actions does not begin to run until the claimant discovers or should have discovered through the exercise through the exercise of reasonable care and diligence the facts establishing the elements of his cause of action."

In the instant case, the Courts below hold that petitioner's cause of action prior to his discovery of *"the facts establishing the elements of his cause of action."*

Hence the judgments entered below did not comply with the *Erie doctrine, supra,* and must be reviewed by this Court.

6. IS THE INSTANT ACTION DISTINGUISHABLE FROM HIS RULE 60(b) MOTION?

It is. On several grounds.

(a) *Res Judicata*, could not be applied based on a judgment, which is now determined to be **VOID. A VOID** judgment has no legal value and petitioner's claims are not barred due to that judgment. Petitioner now determined that Lydia Clay -Jackson has substantially participated before the Texas Court trial, without petitioner's knowledge, consent or authorization. She has signed the Voir Dire of that case with PB-KBB, without petitioner's knowledge, consent or authorization. Robert Wood, after selling petitioner's case, went to Woodville, Texas, with the proceeds of the Sale, and did not participate in Petitioner's case. Lydia Clay-Jackson's actions **cannot bind petitioner because she was not his attorney. L**ydia Clay- Jackson also conducted the appeals in the Texas state courts.

(b) The instant case is based on after the discovery of extrinsic frauds. As per this court's holding on United States v. Throckmorton, (1878), 98 US 61, 25 L. ed 93," **where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells his client's interest to the other side, -these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing [citations]".** In the original case, based on which petitioner's claims are barred,
all of the above described abuses took place. The Courts below applied *res judicata* disregarding this Court's holding on the above mentioned case. For this reason the lowers Courts' holdings are unlawful and must be reviewed by this Court.

7. FALSE, MISLEADING AND MISSTATEMENTS IN BMI'S REPLY BRIEF. Should the Court reject BMI's reply brief?

Petitioner is absolutely appalled by the lies, misstatements and misleading statements made in Battelle's reply brief. There are just too many misstatements to rebut individually and petitioner will try only a few.

On p-1, it is stated, "Consequently, although Paul's claim under the FCA and was properly removed to federal court, his action was properly dismissed for lack of subject matter jurisdiction. This is a fraudulent assertion. The case was not dismissed for that reason. As already stated, Paul is the sole and original source of information this court has subject matter jurisdiction in the case.

On p-3, paragraph-1, it stated: "The district court subsequently granted BMI's motion to dismiss". This is a misstatement. The case was not dismissed on BMI's motion. The district court dismissed the case declaring *res judicata* by relying on PB-KBB/PBQ&D's fraudulent motions, obstruction of justice, mail frauds, concealments of frauds, perjurious affidavits and their introductions of Texas Court judgment, which they now admitted in the Court below, was obtained by fraud. The Courts below are required to apply sanctions for their conducts in that litigation. Petitioner did not discover the frauds on the Texas Court **at that time.** PB-KBB/PBQ&D have committed crime in that lawsuit and must be punished.

On p-3, paragraph-3, it stated: "On August 9, 1995, the district court summarily denied Paul's Rule 60(b) motion." The court denied the Rule 60(b) motion because of the impropriety mentioned was done in the Texas State Court, 6 years earlier, and under Rule 60(b) motion, the Federal District Court did not have the **SUBJECT MATTER**

JURISDICTION, set aside or collaterally attack a State Court Judgment. That is why the instant action was brought as an independent action in the Texas State Court to set aside the judgment which was obtained by fraud and which is now determined to be void.

On p-4, last paragraph, it stated: "Undaunted, Petitioner filed a lawsuit in Texas state court on December 5, 1996", this and subsequent discussions in next two paragraphs, are highly misleading. The instant action was properly brought under RICO, 18 U. S. C. 1961 et. seq., after discovering the elements constituting the cause of action, for obstruction of justice, conspiracy with his ex-attorney, repeated subsequent concealments of the criminal activities of conspiracy and collusion with petitioner's ex-attorney, mail and wire frauds, during the Texas state court litigations and during subsequent litigations. The instant litigation was properly brought in the Texas State Court but it was improperly removed as already stated.

Needless to say that there are numerous such false, misleading statements in BMI's brief which the allowable space will not permit to rebut sentence by sentence. The Court should reject the reply brief in its entirety, as it is submitted under bad faith to mislead the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted

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